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No. 71-1370

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

KATHLEEN HACKETT, *Petitioner*,

*v.*

GENERAL HOST CORPORATION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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### QUESTIONS PRESENTED

1. Whether a district court's discretionary determination, under Rule 23 of the Federal Rules of Civil Procedure, that a class action seeking damages for alleged price fixing on behalf of 1,500,000 individual purchasers from 12,000 retail stores would be unmanageable is a final judgment appealable as of right under 28 U.S.C. § 1291, where means other than appeal under Section 1291 are available to obtain appellate review, the class action ruling can be considered on appeal from a final judgment on the merits, and the plaintiff and purported class representative did not act to terminate her action.

2. Whether, in view of the undisputed record facts in this case, the court below correctly held that the district court did not abuse its discretion under Rule 23 in refusing to confirm, as unmanageable, a class consisting of 1,500,000 individuals who purchased products from 12,000 different stores.

## STATEMENT

Petitioner brought an action for damages against these respondents, which are bakers of bread, in her own behalf and claiming also to represent a class consisting of all purchasers of bread at retail in an 18-county metropolitan area. After full consideration of pleadings, memoranda, affidavits and exhibits addressed specifically to the question of the propriety of such a class, the district court determined that an action on behalf of such a class would be unmanageable. Though the result of such a determination was not dismissal of petitioner's own claim, she purported to appeal as from a final judgment, pursuant to 28 U.S.C. § 1291. The court of appeals dismissed her appeal for lack of finality and, treating the issue raised upon the professed appeal as upon a petition for a writ of mandamus, held that the district court did not abuse its discretion in rejecting the proposed class.

Petitioner's claim upon the discretionary attention of this Court rests largely upon mischaracterizations of the nature and effect of the decisions below,[1] and a

[1] Petitioner states, erroneously, that the district court rejected her proposed class "on the basis of a *per se* determination of unmanageability predicated on the size of the class alone, a ruling made without findings, discussion or a record upon which the determination could be grounded," and that, because of the court of appeals' "broad ruling" on the appealability of the district court's decision, "that decision is completely insulated from review and the case must founder" (Pet. 13).

rather full statement of the case is necessary to reveal how far astray petitioner has gone in her characterizations.

Petitioner professed to be suing an behalf of all of those in 18 counties in three states in and around Philadelphia who had purchased bread at retail at any time during a four-year period (A31). Although the complaint stated that the vast majority of some 6,000,000 or more persons living in that area were consumers of bread, it did not state how many of those consumers were purchasers and hence members of the proposed class. The complaint was uncertain in other respects also. Respondents sell some bread at retail, principally through their "thrift" stores. Mostly, however, they sell at wholesale, directly or through distributors, to supermarkets and other retail grocery stores that in turn sell to consumers. The complaint did not reveal whether the damages claimed related to direct purchases from respondents or to indirect purchases from grocers.[2] Moreover, the complaint did not reveal the amount sought as damages, either by petitioner or by the class.

Pursuant to a local rule establishing the machinery for making the determination whether an action may be maintained as a class action, the district court held a pretrial conference looking toward the development of an adequate record on which to base a determination. A pretrial order was entered providing for the submis-

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[2] The distinction between "direct" and "indirect" purchasers of respondents' products, which petitioner concedes is "obviously relevant" (Pet. 12), has a crucial bearing on standing to sue under the Clayton Act for treble damages based on an alleged overcharge. See p. 11 n. 14, *infra*.

sion of affidavits by the two sides in support of and in opposition to confirmation of the class.

Respondents submitted a number of affidavits from persons familiar with the baking industry and detailed studies of the wholesale baking industry. This record pictured a complicated market structure, lacking any uniform pattern, and established that the retail prices paid by the individual consumers for respondents' products reflected the independent pricing policies of some 12,000 retail stores in the area. The record also showed that the baking industry was a depressed industry, beset by rising costs and declining profit margins, and that wholesale price increases in the relevant period were attributable to increased costs. On the basis of this record respondents contended, *inter alia*, that, as a consequence of the size of the class and the market structure, petitioner's class action would not be manageable within the meaning of Rule 23(b)(3).

Although the proponent of a class action has the burden of proving that the prerequisites of Rule 23 have been satisfied,[2] petitioner made no effort to contest any of the facts established by respondents' affidavits and exhibits. In fact, petitioner submitted no affidavits at all and did not seek to inquire, by discovery or otherwise, into the showing respondents had made.

After extensive briefing and oral argument, the district court denied petitioner's request for confirmation

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[2] *See, e.g.*, DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968); William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp., 49 F.R.D. 35 (E.D. Pa. 1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968); Lucas v. Seagrove Corp., 277 F.Supp. 338, 347 (D. Minn. 1967).

of the action as a class action, setting forth in an opinion its reasons for that decision (A38-A44).

The district court noted that the proposed class might include at least 1,500,000 purchasers out of the 6,000,000 or more consumers and also noted the market structure in which the respondents' products were sold to individual consumers through "approximately 12,000 retailers consisting of supermarkets, grocery, dairy and delicatessen stores" (A41). After reviewing the cases and observing that the manageability of a class action was an "essentially factual question" (A41), the court, on the basis of "the admitted facts," expressed the "considered opinion that *under the facts of this case*, the problem of management of the proposed class is clearly insurmountable" (A44; emphasis added). The district court's ruling was thus narrow in scope and based on "the facts of this case."

Petitioner did not seek a determination pursuant to Fed. R. Civ. P. 54(b) in order to have a "final" judgment entered on the class action issue, from which an appeal could have been taken pursuant to 28 U.S.C. § 1291.[4]

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[4] A decision made final under Rule 54(b) is appealable under 28 U.S.C. § 1291, Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), and a Rule 54(b) determination may be made with respect to class action rulings. *See, e.g.*, Lockwood v. Hercules Powder Co., 172 F.2d 775, 777 (8th Cir. 1949); Hayes v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp., 396 F.2d 448, 449 (3d Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 497 n. 1 (5th Cir. 1968); Nolen v. Shaw-Walker Co., 449 F.2d 506, 508 (6th Cir. 1971); 9 Moore, *Federal Practice* ¶ 110.113[9], at 186 (2d ed. 1970). This Court indicated in *Sears*, moreover, that a district court's abuse of its discretion in deciding whether to make a Rule 54(b) finding is reviewable by the court of appeals. 351 U.S. at 437.

Petitioner did request the district court to make the certification required by 28 U.S.C. § 1292(b) to permit an interlocutory appeal, but the district court denied the request, after "carefully considering plaintiff's argument," on the ground that the statutory prerequisites for such a certification did not exist, *i.e.*, there was no substantial ground for difference of opinion as to a controlling question of law (the determination of non-manageability having been a discretionary one based on the particular facts of the case) and an immediate appeal would not "materially advance the ultimate determination of this case" (A45).[5]

Having sought unsuccessfully to obtain permission to appeal from the interlocutory order rejecting the proposed class, petitioner then undertook to treat the order as a final judgment appealable under 28 U.S.C. § 1291. She did so without having her own complaint dismissed, as other plaintiffs have done when confronted with district court rulings they believed precluded further litigation of a case.[6] Such a dismissal, pursuant to Fed. R. Civ. P. 41, would be a final judg-

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[5] When appropriate, certification under § 1292(b) has often been used as a means of obtaining interlocutory appellate review of class action issues. *See, e.g.*, Matthies v. Seymour Mfg. Co., 270 F.2d 365, 367 (2d Cir.), *rehearing denied on other grounds*, 271 F.2d 740 (1959), *cert. denied*, 361 U.S. 962 (1960); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 567 (10th Cir. 1962); Hohmann v. Packard Instrument Co., 399 F.2d 711, 712 (7th Cir. 1968); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123 (5th Cir. 1969).

[6] *See, e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 679-81 (1958); United States v. Wallace & Tiernan Co., 336 U.S. 793, 794 & n.1 (1949); *cf.* Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921); Thomsen v. Cayser, 243 U.S. 66, 82-83 (1917).

ment appealable as of right; on the appeal the class action ruling could be challenged.

The court below held that the class action ruling of the district court was not a final decision appealable as of right under Section 1291. The court, moreover, treated the appeal as a petition for mandamus[7] and held that the district court's ruling "was within the limits of discretion allowed by Rule 23[(c)(1)]" and was not an abuse of that discretion (A15).

## REASONS FOR DENYING THE WRIT

Petitioner had from the court below on mandamus the review of the district court's ruling as to the propriety of her class action that she sought on appeal. The question she presents as to whether the class action ruling was appealable is therefore academic and clearly does not warrant this Court's review. Moreover, the court of appeals was plainly right in holding that the district court acted within its discretion in refusing to confirm the class proposed by petitioner, and neither the propriety of that holding nor the adequacy of the record support for the district court's underlying discretionary determination involves any question of general importance deserving review by this Court.

In any event, the decision of the court of appeals that on the record of this case the district court's class action ruling is not appealable poses no issue warranting review by this court. The decision below is con-

[7] Class action rulings have been reviewed on mandamus. *See, e.g.*, Interpace Corp. v. City of Philadelphia, 438 F.2d 401 (3d Cir. 1971); Ernst & Ernst v. United States District Court, 439 F.2d 1288 (5th Cir. 1971), and CCH Fed. Secs. L. Rep. ¶ 93433 (5th Cir. April 3, 1972) (reviewing district court's refusal to dismiss class action claim on mandamus after district court denied certification under 28 U.S.C. § 1292(b)).

sistent both with the pertinent decisions of this Court and with the great weight of authority in other circuits. On the record here there is no reason for this Court to review that decision merely because the Court of Appeals for the Second Circuit in some opinions has ventured a limited exception to the orthodox rule that class action rulings are not final. Moreover, there are indications that the Second Circuit, recognizing the inherent difficulties in applying its "death knell" exception, may reconsider its decisions.

Finally, the decision below raises no important questions concerning administration of the antitrust laws or consumer class actions; the latter is a matter on which Congress is presently considering legislative action.

**I. Because Petitioner Had Review of the District Court's Class Action Ruling on Mandamus, and the Court of Appeals' Decision That That Ruling Was Within the District Court's Discretion Is of No General Importance and Clearly Correct, the Question of Appealability Need Not be Reached, and Any Decision Thereon Would Not Affect the Result in This Case.**

Petitioner presents two questions. One relates to the finality, for purposes of appeal, of at least some district court rulings on whether actions should proceed as class actions or only as individual actions; it is this question that is emphasized in the petition. But petitioner also presents a second question, in the very presentation of which she necessarily recognizes that the appealability question, on the record of this case, is quite academic.

For petitioner had review in the court of appeals of the class action ruling that she challenges; her second question is whether the court of appeals erred in sus-

taining the ruling upon review. Treating her appeal as a petition for mandamus, the court of appeals held that the district court's determination was "within the limits of discretion allowed by Rule 23[(c)(1)]," the rule under which class action determinations are made. The scope of review on appeal of the district court's discretionary determination would have been the same.[8] That determination, based upon the particular record of this case, is obviously of no general importance. Moreover, the court of appeals was plainly right in holding that the district court did not abuse its discretion in reaching the conclusion it did on the unmanageability of the class action proposed by petitioner.

Thus, the appealability question would not have to be reached by this Court. And if it were reached, the utmost that could be accomplished would be "a useless and profitless reversal," which would amount to "nothing more than an advisory opinion" since it would not affect the outcome of the case.[9] In such circumstances, as this Court has recognized, review of a question, however seemingly important, is unwarranted.

In an effort to impeach the court of appeals' ruling, petitioner makes a number of statements (*e.g.*, that the district court's rejection of the class action was based "solely on the size of the class") which are simply not

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[8] *See, e.g.*, Kansas City v. Williams, 205 F.2d 47 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953); Cypress v. Newport News Gen'l & Non-Sectarian Hospital Ass'n, 375 F.2d 648, 653 (4th Cir. 1967); Johnson v. Georgia Highway Express, Inc., *supra*, 417 F.2d at 1123; *cf.* Jumps v. Leverone, 150 F.2d 876, 877 (7th Cir. 1945); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 300 (2d Cir. 1969).

[9] *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fay v. Noia, 372 U.S. 391, 428-30 (1963).

supported by the record here, as we have shown in the statement above, a showing summarized in the margin.[10]

More importantly, petitioner's contentions demonstrate that, in the final analysis, she is asking this Court to review the adequacy of the district court's written opinion stating its refusal to confirm petitioner's class action (a step that could properly have been taken without any opinion [11]) in light of the facts of record in this case.[12] However, this Court does "not grant a cer-

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[10] Despite petitioner's claims (Pet. 12), respondents in fact proffered voluminous evidence which had a direct bearing on the facts described by petitioner as being "obviously relevant" to the question of manageability. Uncontradicted affidavits and exhibits portrayed, *inter alia*, the complexity of the distribution system, the direct and indirect nature of the purchase by class members, and the geographic concentration of class members (*see, e.g.*, court of appeals appendix, pp. 27a-64a, 83a-101a). The district court articulated its decision in a memorandum opinion, and that opinion was not based "solely on the size of the class," but was also based on the complexity of the distribution system involving purchases by class members of respondents' products through some 12,000 retail stores (A41).

[11] Fed. R. Civ. P. 52(a) (findings and conclusions required only on motions under Rules 12, 41(b) and 56); *see* Interpace Corp. v. City of Philadelphia, *supra*, 438 F.2d at 404. Even if findings and conclusions had been required, the court's opinion would have satisfied that requirement, *see* United States ex rel. R. W. Vaught Co. v. F. D. Rick Co., 439 F.2d 895, 899 (8th Cir. 1971); Christensen v. Great Plains Co., 418 F.2d 995, 1000 (8th Cir. 1969), especially since there were no disputed issues of fact. *Cf.* Jones v. New York Cent. R.R., 182 F.2d 326, 327 (6th Cir.), *cert. denied*, 340 U.S. 850 (1950).

[12] Whether a district court's decision is to stand or fall on the merits turns not on the presence, absence, or textual adequacy of the district court's findings and conclusions, but rather on whether they are "supported by the evidence." United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944); United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964).

tiorari to review evidence and discuss specific facts." *United States* v. *Johnson,* 268 U.S. 220, 227 (1925). Such review by this Court in the instant case would be particularly inappropriate since the district court's refusal to confirm petitioner's sprawling class was consistent with the weight of relevant authority [13] and was so plainly sound in view of the size of the class, the complexity of the distribution system involving 12,000 retail stores, the different varieties and brands of products involved, the differences in local or regional markets, and the doubtful status of petitioner's standing to sue.[14]

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[13] Virtually every court to consider the manageability or propriety of a class action of this size asserting similar claims in a comparable market setting has ruled against the class action. *See, e.g.,* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 71-74 (D. N.J. 1971); Reinisch v. New York Stock Exch., 52 F.R.D. 561 (S.D. N.Y. 1971); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 321 (S.D. N.Y. 1970); *cf.* Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D. N.Y. 1971).

[14] As noted above, petitioner has failed to show whether or to what extent her purchases of respondents' products were made directly or indirectly. In two other similar cases involving the baking industry courts have held that those purchasers who did not buy directly from one of the alleged co-conspirators do not have standing. City of Akron v. Laub Baking Co., CCH 1972 Trade Cas. ¶ 73930, at 91889 (N.D. Ohio April 18, 1972); City of Detroit v. American Bakeries Co., Civ. Nos. 33046,*et al.*, unreported (E.D. Mich. Feb. 16, 1971). *See also, e.g.,* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187, 1188 (3d Cir. 1971); City and County of Denver v. American Oil Co., 53 F.R.D. 620, 629-39 (D. Colo. 1971); United Egg Producers v. Bauer Int'l Corp., *supra,* 312 F. Supp. at 321.

**II. The Decision of the Court Below Is Consistent With the Weight of Authority Among the Courts of Appeals and With the Pertinent Decisions of This Court, and There Is No Occasion To Consider Here the Propriety of Certain Decisions in the Second Circuit.**

Petitioner attempts to portray the court below as having adopted some unprecedented "novel" and "all-embracing" ruling as to the appealability of class action rulings (Pet. 6, 7, 13), which is an aberrant departure from the decisions of other courts of appeals and in conflict with those decisions. Petitioner cites chiefly three decisions in the Second Circuit. This portrayal is far from reality. The decision below as to appealability accords with the great weight of authority in other circuits, including the Second Circuit. It is also altogether consistent with the decisions of this Court.

Various courts of appeals with almost perfect consistency have long held that class action rulings are not appealable, in the absence of a Rule 54(b) determination, the denial of an injunction under 28 U.S.C. § 1292(a)(1), a certification under 28 U.S.C. § 1292(b), or a final judgment of dismissal. Thus, the confirmation of a class action has been held not appealable by the defendant.[15] Similarly, where an asserted class action is limited in scope,[16] or is denied,[17] it has long been

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[15] *E.g.*, Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969); Interpace Corp. v. City of Philadelphia, *supra*, 438 F.2d at 403.

[16] *E.g.*, Jumps v. Leverone, *supra*, 150 F.2d at 877.

[17] *E.g.*, Oppenheimer v. F. J. Young & Co., 144 F.2d 387, 388 (2d Cir. 1944); Lockwood v. Hercules Powder Co., *supra*, 172 F.2d at 777; All American Airways, Inc. v. Elderd, 209 F.2d 247, 249 (2d Cir. 1954); Rogers v. Alaska S.S. Co., 249 F.2d 646, 649-50 (9th Cir. 1957); Lippsett v. United States, 359 F.2d 956, 958-59 (2d Cir. 1966); Hayes v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp., *supra*, 396 F.2d at 449; City of New York v.

the law—both before and after the 1966 revision of Rule 23 [18]—that such a ruling is not a final decision appealable as of right under Section 1291. Indeed, petitioner does not dispute that ordinarily a class action ruling is *not* a final decision appealable as of right under Section 1291. Such a ruling is like many other interlocutory rulings that may appear momentous when made in their relationship to the future conduct of a particular lawsuit or in the burdens or disadvantages they impose on a party. Those characteristics do not make such rulings appealable as of right.[19]

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International Pipe & Ceramics Corp., *supra*, 410 F.2d at 299; Caceres v. International Air Transport Ass'n, 422 F.2d 141, 143-44 (2d Cir. 1970); Weingartner v. Union Oil Co., 431 F.2d 26, 29 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Korn v. Franchard Corp., 443 F.2d 1301, 1306-07 (2d Cir. 1971); Gosa v. Securities Invest. Co., 449 F.2d 1330, 1332-33 (5th Cir. 1971).

[18] Class action rulings were not final for purposes of appellate jurisdictional statutes prior to the 1966 amendments to Rule 23. Those amendments cannot have altered the nonappealable status of such rulings, for, as this Court held, the adoption of amended Rule 23 in 1966 "did not and could not" change jurisdiction under applicable statutes. Snyder v. Harris, 394 U.S. 332, 336-38 (1969); *see* Fed. R. Civ. P. 82.

[19] *E.g.*, Bancroft Nav. Co. v. Chadade S.S. Co., 349 F.2d 527, 529-30 (2d Cir. 1965) (discretionary order requiring security); Donlon Indus., Inc. v. Forte, 402 F.2d 935, 936-37 (2d Cir. 1968) (discretionary order requiring no security); Borden Co. v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969) (order requiring non-party to produce documents); Miller v. Pleasure, 425 F.2d 1205 (2d Cir. 1970) (order denying appointment of counsel to indigent plaintiff in civil action); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., CCH 1972 Trade Cas. ¶ 73817, at 91455-56 (2d Cir. Jan. 20, 1972) (order in class action said to have potential effect of eliminating so many members from the class that it would no longer be sufficiently numerous to remain a class action). *See generally* 9 Moore, *Federal Practice* ¶ 110.3 [6], at 173 & n. 3 (2d ed. 1970).

To the abundance of authority with which the decision below is in accord there are only two exceptions worth noting. Those are decisions of the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), and *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971).[20] The vitality of those decisions is doubtful even within the Second Circuit.

In *Eisen* the Second Circuit accepted an appeal under Section 1291 from an order dismissing a class action claim for damages under the federal securities and antitrust laws, where the plaintiff's individual claim was for $70. The panel's opinion disregarded prior contrary Second Circuit decisions not involving "newly amended Rule 23," then "assumed" that no competent lawyer would represent the plaintiff alone with his $70 claim, and concluded that to bar an "appeal now" would be "the death knell of the action" and end it for all practical purposes. The opinion did not discuss whether an attorney's fee might be awarded if plaintiff prevailed, nor did it discuss other alternatives, such as a Rule 54(b) finding, a Section 1292(b) certification, or an appeal from a voluntary dismissal.

Between *Eisen* and *Korn*, various panels of the Second Circuit dismissed appeals from class actions where the plaintiff's own claim was larger than that in

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[20] In Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969), a case much like *Eisen* on its facts, the question of appealability was not raised until the case was being considered on the merits, and the appealability issue was summarily disposed of in a footnote on the basis of *Eisen*, without any real analysis. 406 F.2d at 295 n. 6.

*Eisen*.[21] Then in *Korn*, a different panel expressed misgivings about the *Eisen* rule,[22] but the panel majority concluded that "*at the present time* we are not persuaded that we should reconsider our precedents and augment the onrushing tide of appeals." *Id.* at 1305. (Emphasis added.)[23] Accordingly, the panel applied *Eisen* narrowly to hold that a rejection of a class action was appealable in a case where the plaintiff's claim under the securities laws was for $386, but was not appealable in a similar case where the plaintiff's claim was for $8,500. The panel gave no indication as to where or how the dividing line should be drawn.

Chief Judge Friendly's concurrence in *Korn*, expressing doubt that the "death knell" doctrine "is truly workable or, indeed, is legally sustainable," evinced interest in *in banc* consideration of the issue "to formulate a rule that will avoid the necessity of such *ad hoc* judgments as have been required . . . and also will

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[21] *See* City of New York v. International Pipe & Ceramics Corp., *supra*; Caceres v. International Air Transport Ass'n, *supra*. The panel in *Caceres* expressed the view that the narrow *Eisen* exception "should not be expanded . . . ." 422 F.2d at 144.

[22] The panel stated that the *Eisen* exception "should [not] be too liberally applied," because (1) "courts of appeals are now being overwhelmed by an unprecedented number of appeals," (2) experience may show "that the 'death knell' rule is not 'truly workable,'" and (3) "we can rely on the good judgment and discretion of the district judges to apply amended Rule 23 fairly and sensibly." 443 F.2d at 1305-06.

[23] After *Eisen* was decided, this Court observed that there was "no compelling reason" to overturn a settled interpretation of a jurisdictional statute "in order to add to the burdens of an already overloaded federal court system." Snyder v. Harris, *supra*, 394 U.S. at 341. *See generally* Carrington, *Crowded Dockets of the Courts of Appeals: The Threat to the Function of Review of the National Law*, 82 Harv. L. Rev. 542 (1969).

afford equality of treatment as between plaintiffs and defendants." *Id.* at 1307.

If the Second Circuit does not reconsider and disapprove its own aberrant departures from the general understanding of the final judgment rule, there may be occasion for this Court to pass upon the so-called "death knell" exception. This case, however, is not an appropriate vehicle for consideration of the exception. We have already shown that the court of appeals' review of the district court's ruling on mandamus means that the question of the appealability of the district court's class action ruling need not be reached. More than that, although petitioner's counsel has made representations in the flattest of terms in the district court, the court of appeals and here that the action will come to an end unless petitioner's proposed class is confirmed, such representations do not establish that termination of the action is the necessary result of the ruling—a premise, as we understand, of the "death knell" exception and more generally an essential premise for treating as appealable any interlocutory order so affecting the future conduct of a case as to amount to a final disposition of it. *See Carroll* v. *United States*, 354 U.S. 394, 405 (1957).

In dismissing an appeal from a refusal to confirm a class action in *Gosa* v. *Securities Invest. Co.*, 449 F.2d 1330 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit said that, if the "death knell" exception is to be applied, each case "must depend on its own facts" and the crucial issue "is wholly a fact issue . . . ." 449 F.2d at 1332. If a plaintiff wishes to try to convert an otherwise interlocutory class action ruling into a "final" appealable decision by reason of the asserted "death knell" effect, then the plaintiff

had the burden of developing" the relevant facts. *Ibid.*[24]

The relevant facts were not developed here either. And, as we have pointed out (pp. 6-7, *supra*), petitioner did not suffer her action to be dismissed as she might have done to create an indubitably final judgment, on the appeal from which the class action ruling could have been asserted as error. In these circumstances, contrary to what petitioner asserts (Pet. 7-9), to treat as final and appealable an order that on its face is interlocutory would be inconsistent with the pertinent decisions of this Court, including the decisions in which the "death knell" exception purportedly finds its source.

This Court has said that " 'the final judgment rule is the dominant rule in federal appellate practice,' " deeply rooted in the common law and in federal statutes since the First Congress. *Di Bella* v. *United States*, 369 U.S. 121, 124, 126 (1962). The Court has recognized that enforcement of the final judgment rule may have adverse consequences for some litigants, *see, e.g., Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); *Parr* v. *United States*, 351 U.S. 513, 519-20 (1956), and may even result in some decisions "of grave importance to a litigant . . . never [being] satisfactorily reviewable." *Carroll* v. *United States*, *supra*, 354 U.S. at 406.

If exceptions to the final judgment rule are needed, however, this Court has said it is generally for Congress to make them, as it has done in various circumstances. *Carroll* v. *United States*, *supra*, 354 U.S. 407;

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[24] Among the relevant issues noted in *Gosa* were: the expense of litigation reasonably to be anticipated; the plaintiff's degree of solvency; the likelihood of recovery of attorney fees; and the potential amount of claims of other class members. 449 F.2d at 1332.

*Di Bella* v. *United States*, *supra*, 369 U.S. at 124. Any judge-made exception—especially one that involves the drawing of such wavering lines as the Second Circuit's "death knell" exception—creates uncertainty, and litigants face the undesirable risk that a failure to appeal from a particular ruling when it is made will result in a waiver of the right to appeal after a final judgment. *See Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956)

Petitioner is wrong when she contends that, in declining to apply a "death-knell" exception here, the court below acted inconsistently with *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). There this Court recognized a "small class" of interlocutory rulings which may be treated as "final" for purposes of appeal. *Id.* at 545-47. The class is composed of rulings on matters "separable from, and collateral to, rights asserted in the action." In that case the district court ruling held appealable was on "a serious and unsettled" legal question relating to the applicability in a diversity suit in a federal court of a new state statute dealing with a requirement that certain litigants give security for costs and attorneys' fees. The ruling was one that would not be "merged in the final judgment" and thus would not be reviewable on any appeal from such a judgment. The Court emphasized that a different question would have been presented if the statute had been clearly applicable and the question involved only the exercise of discretion as to the amount of the security, "a matter the statute makes subject to reconsideration from time to time . . . ."

The ruling of the district court in this case is in no meaningful sense "separable from, and collateral to,

the rights asserted in the action." Adverse class action rulings may be reviewed on appeal from final judgments.[25] Moreover, the ruling involved no unsettled question of law but merely represented the district court's exercise of discretion in applying Rule 23 to particular facts and thus was altogether as interlocutory as the discretionary ruling under the state security statute hypothesized in the *Cohen* case.

The decision of the court below is completely consistent with the decisions of this Court.[26]

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[25] *See, e.g.*, Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); Cypress v. Newport News Gen'l & Non-Sectarian Hospital Ass'n, *supra*, 375 F.2d at 652-54; *cf.* Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968).

[26] Petitioner's claim that the decision below "cannot be reconciled" with Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), and Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), is not sound. *Gillespie* involved a district court order striking parts of a complaint on the basis of an interpretation of the Jones Act. The issue was presented to the court of appeals both by appeal and by a mandamus petition, and the court, in affirming on the merits, found it unnecessary to determine how the question should properly have been brought before it. In this Court the parties agreed that the decision in question was appealable and the issue of appealability was not briefed. *See* 379 U.S. at 152, 170 n. 6. In affirming the decision of the court of appeals this Court merely held that the case was "obviously marginal" as to being final and appealable under § 1291, but concluded that "now that the case is before us" it should be decided on the merits to lessen the eventual costs to the parties of further litigation. *Gillespie* laid down no broad rule with which the decision below conflicts. So it is with *Dickinson*. There the Court held that one party's appeal from the "final judgment" in a multi-party case, entered after post-trial proceedings concerning relief which did not involve the appellant, was untimely because any appeal by that party should have been taken from an earlier post-trial decision, which fully adjudicated the appellant's claims and which was in no sense "tentative, informal, nor incomplete." 338 U.S. at 514.

### III. The Decision Below Does Not Conflict With Any Established "Policies" Concerning Consumer Class Actions or the Administration of the Antitrust Laws.

In an effort to amplify the significance of the narrow rulings of the district court and the court of appeals, petitioner contends (1) that they are in conflict with some "policy with respect to consumer class actions" which is "evolving" in some unspecified manner (Pet. 8), and (2) that they raise "important questions affecting the administration of the antitrust laws and other regulatory statutes . . ." (Pet. 9). Neither charge is warranted in this case.

The district court's decision was explicitly based on the facts of this case and has no necessary implications for other class actions—by consumers or by other plaintiffs—under the antitrust laws or other laws.[27] Moreover, since it is primarily a legislative function to strike a jurisdictional balance between the need to redress relatively small grievances and the plain fact that "courthouses are not coliseums," *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 297-98 (2d Cir. 1969), evolution of policy concerning consumer class actions in federal courts should occur primarily in the legislature. In fact, legislation concerning consumer class actions is actively being comprehensively studied by Congress at this time.[28]

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[27] In Hawaii v. Standard Oil Co., 92 S. Ct. 885 (1972), this Court noted that a class action on behalf of all individual purchasers of gasoline for treble damages under the antitrust laws had been rejected as unwieldy, and made no suggestion that that ruling was contrary to the purposes of the antitrust laws or to any "policy" concerning consumer class actions. *Id.* at 893.

[28] Consumer class action bills have been introduced in both houses in the present Congress. *See* H.R. 5630, H.R. 6315 and S. 984. Hearings have been held on S. 984. The Senate Commerce Committee has just completed a study proposing an extensive survey

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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and cost-benefit analysis of class action litigation, *Staff Review of Class Action Legislation*, Senate Comm. on Commerce, 92nd Cong., 2d Sess. (Comm. Print. April 1972), which the Committee is circulating for comments. *See* letter from Warren G. Magnuson, Chairman, Senate Comm. on Commerce, May 5, 1972 (copy attached as Appendix A to this brief). *See also* BNA A.T.R.R. No. 562, May 9, 1972, pp. A-1, D-1 to D-3.

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# APPENDIX

**APPENDIX**

UNITED STATES SENATE

Committee on Commerce
Washington, D.C. 20510

May 5, 1972

Dear Friend:

Enclosed are two copies of a proposed survey of the actual experience with class action litigation under Federal Rule 23 and various similar state rules.

The Commerce Committee would appreciate your assistance in evaluating this proposed survey. The textual portion of this preliminary document (the bulk of which contains lists of attorneys and class action case descriptions) has a set of questions and describes in detail the direction of the proposed study. I would find it most helpful if you could take the time to respond to the questions in the textual portion and also to give me your general reaction to the scope of this study.

Enclosed is a postage free envelope for your use. You may find it easiest to make your comments directly in one copy of the staff review and return it to me.

Your assistance is appreciated.

Sincerely yours,

/s/ Warren G. Magnuson
Warren G. Magnuson
Chairman

WGM/mps